85-2000

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. _____

ALICIA M. GRIJALVA
and AMANDA ERICA GRIJALVA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RONALD P. MCCLUSKEY
Suite 1135
First City National Bank Bldg.
El Paso, Texas 79901
(915) 532-0985

SIR SPEEDY PRINTING CENTER-WEST EL PASO, TEXAS 79902

QUESTIONS PRESENTED

Whether the policy and practice of the Secretary of Labor in making an award under 5 U.S.C. §8101 et seq. (F.E.C.A.) to a Federal Employee when;

(i) The injury was *not work related*, and,

(ii) Said employee did not sign the original application, and,

(iii) Said employee was mentally incapable of making a voluntary and rational decision immediately after the injury, and, continues to be incapable of such a decision and,

(iv) The statute (5 USC §8101 et seq.) and case law clearly does not authorize the making of said award, is void ab initio, unconstitutional and violative of the Equal Protection Clause and the Due Process Clause of the Fifth Amendment to the United States Constitution, and deprives the judicial branch of any of its prescribed powers under the constitution.

LIST OF PARTIES TO THE PROCEEDING

The Petitioners filing in this petition for a Writ of Certiorari are: ALICIA M. GRIJALVA and AMANDA ERICA GRIJALVA.

The Respondents are: UNITED STATES OF AMERICA.

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IN THE

Supreme Court of the United States

October Term, 1985

No._____

ALICIA M. GRIJALVA
and AMANDA ERICA GRIJALVA,
Petitioner

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

ALICIA M. GRIJALVA and AMANDA ERICA GRIJALVA, the Petitioners herein, prays that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 29, 1986.

OPINIONS BELOW

The opinion of the Court is unreported and is printed in Appendix A hereto. The judgment of the Court is printed in Appendix C hereto. The Journal Entry of Judgement of the Trial Court is printed in Appendix C hereto.

JURISDICTION

The judgment of the Court was entered on January 29, 1986. A petition for rehearing was not filed. The jurisdiction of the Supreme Court is invoked under the United States Constitution, ART 3 §2 and 28 USCS §1254(1) and other relevant statutes.

STATUTES

This case involved Title 5 U.S. Code §8101 et seq and specifically §8102 which provides, in pertinent part, as follows:

".....(a) The United States shall pay compensation as specified by this subchapter for the disability of death of an employee resulting from personal injury sustained *while in the performance of his duty*, unless the injury or death is:

"(1) caused by willful misconduct of the employee;

(2) caused by the employee's intention to bring about the injury or death of himself or of another; or

(3) proximately caused by the intoxication of the injured employee" (emphasis added)

as well as §8128 which provides, in pertinent part:

".....(a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may—

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.

(b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is;

(1) *final and conclusive for all purposes* and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise." (emphasis added)

STATEMENT OF THE CASE

ALICIA M. GRIJALVA, a civilian Army employee, was injured when, while driving home from work, she collided with a U.S. Army vehicle. ALICIA M. GRIJALVA's supervisor applied for and ALICIA M. GRIJALVA received Workers' Compensation benefits following an erroneous determination by the Secretary of Labor that she had been injured *in the course of her employment*. Grijalva and her daughter have sought damages under the Tort Claims Act, only after being prompted and accompanied by her former supervisor who had initially placed Appellant on workers' compensation, to an attorney's office to seek legal advice.

The Secretary's erroneous and unauthorized award of compensation benefits have been held to bar Grijalva from bringing any suit against the United States for that injury.

It has been held that because the Secretary's erroneous and unauthorized determination was by statute, final and conclusive for all purposes and not subject to review, Grijalva could not collaterally attack the Secretary's determination of coverage in this Tort Claims Act suit. To attack her ineligibility for workers' compensation, Grijalva had to request review by the Secretary, which because of previous determinations and letters from the Secretary would have been a futile effort. ALICIA M. GRIJALVA, a civilian employee of the U.S. Army, suffered injuries when the vehicle she was driving home from work was rammed by a U.S. Army vehicle, which had failed to stop at a stop sign. As a direct result of the accident she was mentally incapable of making a voluntary and rational decision. On the day after the accident, *Grijalva's supervisor* filed a notice of injury with the Department of Labor. Subsequently, on the advice of her supervisor and unable to mentally understand or comprehend her choices Grijalva herself filed a claim for compensation. The Secretary of Labor erroneously determined that Grijalva had been injured in the course of her employment, and the Office of Workers' Compensation has paid her thus far $32,254.20 in disability compensation, $11,706.90 in reimbursement of her medical expenses, and $2,244 in continuation of salary during her disability, all of which she has offered to return to the Government.

The Rulings Below:

On August 14, 1984 ALICIA M. GRIJALVA and AMANDA E. GRIJALVA filed an action for damages against the UNITED STATES OF AMERICA under the Federal Tort Claims Act (28 U.S.C. §1346(b)). On or about April 4, 1985, the U.S. District Court for the Western District of Texas, in Cause Number EP-84-CA-286 granted the Defendant's Motion for Summary Judgment on the grounds that the Secretary of Labor's erroneous decision was final, conclusive and not subject to review, by a Court of Law.

On or about January 29, 1986, the United States Court of Appeals for the Fifth Circuit affirmed the Decision of the District Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve what appears to be the failure to observe, by the lower Courts, the unequivocal wording of the law so as to benefit Big Government at the expense of the individual disabled citizen, and deprive federal workers from equal protection of the laws Visa Vi their counterparts in the private sector.

As the facts herein are observed and arguments have been heard and digested, it must surely be felt that the lower Courts are truly burying their heads in the sand, like the proverbial ostrich.

The issues in this case are clear and concise. The Federal Employees' Compensation Act provides for the payment of compensation for disability or death resulting from a personal injury sustained by an employee *while in the performance of his duty*, 5 USCS §8102 (a), with certain exceptions as to injuries or death caused by the employee's own misconduct.

The right to compensation under the Federal Employees' Compensation Act is limited to disability or death that results from injury sustained *in the performance of duty*. Compensation is payable not only for injuries directly connected with employment, but also for those incurred in activities necessarily incidental to it. An employee *in some circumstances* is entitled to reimbursement for disability from injuries sustained after regular working hours. *Stiffler v. United States*, (D.C., PA.) 122 F. Supp. 304, nevertheless, to be compensable under the statute, the disability complained of must be shown to have been an *ultimate consequence* of an injury sustained while in the performance of duty, *Mohr v. United States* (N.D., Cal.) 184 F. Supp. 80.

While the Federal Employees' Compensation Act is given a liberal construction, *Desousa v. Panama Canal Co.* (S.D., N.Y.) 202 F. Supp. 22, it also reflects a congressional intention to provide a liability on the part of the Government that is both limited and determinate, *Busey v. Washington* (D.C. Dist. Col.) 225 F. Supp. 416.

The Act does not abrogate or otherwise affect an employee's Common-Law rights of indemnity against responsible third persons or negligent fellow employees, *Allman v. Hanley*, (CA 5, Ala.) 302 F.2d 559.

In the instant case, the following facts are undisputed:

(i) Grijalva's injury *was not work related,*

(ii) Grijalva did not sign the original application for compensation, and,

(iii) Grijalva was mentally incapable of making a voluntary and rational decision immediately after the injury, and, continues to be mentally incapable.

(iv) The statute (5 USC §8101 et seq) did not authorize the making of said award by the Secretary of Labor.

All this clearly violates the Equal Protection Clause and the Due Process Clause of the Fifth Amendment to the United States Constitution. While the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution does not apply to every termination of government employment; it applies to those terminations which deprive an individual of liberty or property. *Berg v. Claytor,* D.C.D.C. 1977, 436 F. Supp. 76, vacated on other grounds 591 F.2d 849, 192 U.S. App. D.C. 240.

For a governmental employee to be entitled to procedural due process as regards termination of his employment, he must show that his termination has deprived him of interest in "liberty" or that he had a "property" interest in continued employement. *Correa Velez v. DeJesus Schuck,* D.C. Puerto Rico 1975, 396 F. Supp. 1256.

The Due Process Clause of the Fifth Amendment guarantees all persons an opportunity to be heard at a meaningful time and in a meaningful manner before being deprived of any property right. *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); *Goldberg v. Kelly,* 397 U.S. 254, 266 (1970). This Court only recently reiterated that "the root requirement" of due process is a meaningful opportunity to be heard before being "deprived of any significant property interest." *Cleveland Board of Education v. Loudermill,* U.S., 105 S. Ct. 1487, 1493 (1985). As the D.C. Circuit has noted, where statutory or regulatory procedures designed to afford timely and meaningful review are in place, due process requires "scrupulous compliance" with those procedures. Whether due process rights have been violated frequently involves an ad hoc balancing of private and govermental interests, weighing the procedural protections that may be afforded to substantive private interest against the costs such protections would impose upon govermen-

tal interest. The Court should not countenance any departure from the statutory scheme.

Clearly Grivalva had a property interest in her physical and mental well being and in her employment with the Federal Government. She also had a property interest in a cause of action for negligence against a Federal Employee (F.E.C.A.). The erroneous and unauthorized determination of eligibility for benefits under F.E.C.A. by the Secretary of Labor has deprived Grijalva of her cause of action under the Federal Tort Claims Act in violation of her due process rights and equal protection rights afforded her under our constitution.

What Grijalva has received under F.E.C.A. is considerably less that what she might receive if she pursued her cause of action under the Federal Tort Claims Act.

Mental "capacity" is a comparative term that varies with the character of the act to which it refers. A person may be quite capable of performing certain reasoning functions of the mind, yet be wholly incapacitated as to others. *Smith v. Guerre*, (1915, CA) 175 SW 1093. The general definition of the term mental capacity seems to contemplate the ability to understand the nature and effect of the act in which a person is engaged and the business he is transacting. *Gray v. Allen* (1922, CA) 243 SW 684, writ dism w o j, later app (CA) 269 SW 510 writ dism w o j.

"Mental Capacity" meant that a person making an ordinary contract must be able to understand the nature and probable consequences of his act in entering into an agreement. *Lemons v. Davis*, (1957, CA Fort Worth) 306 SW2d 224, writ ref. n.r.e.; *Burchill v. Hermsmeyer*, (1924, CA) 262 SW 511, later proceeding (CA) 263 SW 1116, writ dism w o j.

Grijalva did not make the original application for F.E.C.A. compensation because she was in no condition to understand the nature and probable consequences of this act. When she signed subsequent applications she was still in the same mental condition. It was only when she consulted her attorney at the behest and the accompaniment of her supervisor that she and her mother were made aware that she had an alternative remedy under the Federal Tort Claims Act; although the depth of Appellant's awareness and understanding may certainly be questioned.

Every mentally incapacitated person in the State of Texas has the rights, benefits, responsibilities, and privileges guaranteed by the constitution and laws of the United States and the constitution and laws of the State of Texas. Absent specific provisions of law to the contrary presented under special dispose of property including contractual rights; the right of sue and be sued; all rights relating to the granting, use, and revocation of licenses, permits, privileges, and benefits under law; the right to religious freedom; and rights concerning domestic relations. *Revised Civil Statutes of Texas, Art. 5547-80(a).*

The case law herein may be succinctly stated as follows:

The language of Title 5, U.S.C. §8101 et seq is unambiguous and concise, and words must be given their common-sense interpretation. *U.S. v. Hayes,* D.C. Ky. 1966, F. Supp. 849.

Title 5 U.S.C. §8101 et seq does not extend compensation to an injured federal employee on the sole basis that an employee was injured on the way home from work. *Bailey v. U.S. Through Dept. of Army,* C.A. La. 1971, 451 F.2d 963.

Title 5 U.S.C. §8101 et seq does not automatically apply to federal employees going to and from work and while on federal property; the premises rule is but one factor in determining whether an injury is compensable. *Avasthi v. U.S.,* C.A. Ga. 1979, 608 F.2d 1059.

Through Title 5 U.S.C. §8101 et seq is the exclusive remedy of those *injured in performance of their duty,* this subchapter does not prevent those not covered by it from pursuing other remedies. *Canon v. U.S.,* D.C. Cal. 1953, 111 F. Supp. 162, affirmed 217 F.2d 70.

That a federal employee injured in motor vehicle collision allegedly resulting from the negligence of two other federal employees acting within the scope of their employment had as his exclusive remedy his claim under Title 5 U.S.C. §8101 et seq did not preclude his case from being a claim under the Federal Tort Claims Act, sections 1346(b) and 2671 et seq. of Title 28. *Van Houten v. Ralls,* D.C. Nev. 1967, 290 F. Supp. 67.

An injured federal employee may seek compensation under Title 5, U.S.C. §8101 et seq. without regard to negligence or bring suit under the Federal Tort Claims Act, sections 1346(b) and 2671 et seq. of Title 28, in which case negligence must be proven. *Henson v. U.S.,* D.C. Mo. 1949, 88 F. Supp. 148.

Where a civilian employee who worked on an Air Force base had checked out from his employment site, had traveled three miles from that location and was then killed in an automobile accident after having returned to restricted area, with permission of government, to avoid road construction on his normal route, there was no substantial question presented as to whether his death occurred in performance of his duties and recovery of his wife and children under the Federal Tort Claims Act, sections 1346(b) and 2671 et seq. of Title 28, was not barred by any coverage under Title 5, U.S.C. §8101 et seq., *U.S. v. Udy*, C.A. Utah 1967, 381 F.2d 455.

Title 5 U.S.C. §8101 et seq. applies only to a *federal employee injured on the job;* if injury occurs when employee is not on the job, Title 5 U.S.C. §8101 et seq. is not the exclusive remedy, nor even the appropriate remedy, but if personal injury did occur on the job, Title 5 U.S.C. §8101 et seq. is the exclusive remedy. *Griffin v. U.S.*, C.A. Mo. 1983, 703 F.2d 321.

Even though the findings of fact by the Secretary of Labor in a federal workers' compensation case were unreviewable by a court by mandamus or otherwise the question the district court could have jurisdiction to address was whether the policies or practices brought to bear in the claimant's case violated the constitution. *Allen v. Faragasso*, D.C. Cal. 1984, 585 F. Supp. 1114.

The provision of the Federal Employees Compensation Act [5 U.S.C.A. §8128(b)] precluding judicial review of a decision of the Secretary of Labor "in allowing or denying a payment" did not preclude judicial review of the claimant's allegation that he was denied due process; *Rodrigues v. Donovan*, C.A. 9 (Cal.) 1985, 769 F.2d 1344.

Clearly, Grijalva had basic due process rights under the Fifth Amendment of the United States Constitution and these have been denied her. The bottom line is that the Federal Government has rammed the F.E.C.A. compensation down her throat, knowing full well that she might receive a more equitable benefit under the Federal Tort Claims Act. The decisions of the Department of Labor, concerning Federal Employees and F.E.C.A. by statute appear to be infallible, thus, depriving certain citizens of their constitutional rights as well as the judicial branch of their prescribed powers.

To withhold from the Appellant, (a citizen) a right to be heard upon the question which in our juris prudence is called the con-

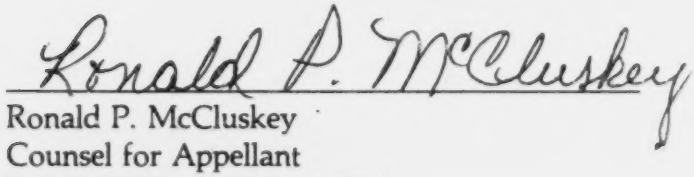
stitutionality of a law, when that law is supposed to govern his right or prescribe his duties, would be as unjust as it would be to deprive him of the right to be heard upon the construction of the law, or upon any other legal question that arises in the clause. The citizen lives under the protection, and is subject to the requirements, of a written fundamental law, the Constitution. No department of the national, or of any State government, can lawfully act otherwise than according to the powers conferred or the restrictions imposed by that instrument, the Constitution. If the citizen believes himself to be aggrieved by some action of government which he supposes to be in violation of the Constitution, he must be heard upon that question, and it must be adjudicated, or there can be no administration of the laws worthy of the name justice, *History of the Origin Formation Adoption of the Constitution of the United States*, Curtiss, Vol. II, (1858), PP-433-436.

Accordingly, a Writ of Certiorari should issue in this case to preserve the proper equilibrium between the authority of the all powerful bureaucracy exercised by the Secretary of Labor *(the executive branch of government)* and the relatively powerless individual citizen, (Due Process and Equal Protection Rights), and the right if any of the legislature to prohibit the judicial branch of any of its prescribed powers granted it and the citizenry by the Constitution.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted and the decision of the Fifth Circuit, Court of Appeals be vacated and remanded.

Respectfully submitted,



Ronald P. McCluskey
Counsel for Appellant
First City National Bank Bldg.
Suite 1135
El Paso, Texas 79901
(915) 532-0985

CERTIFICATE OF SERVICE

I, Ronald P. McCluskey, a member of the Bar of the Supreme Court of the United States and counsel of record for ALICIA M. GRIJALVA and AMANDA ERICA GRIJALVA, Appellant herein, hereby certify that on the 29th day of May, 1986, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On Thomas J. McHugh, by depositing such copies in the United States Post Office, El Paso, Texas, with first class postage prepaid, properly addressed as follows: Mr. Thomas J. McHugh, 353 U.S. Courthouse, 500 E. San Antonio Street, El Paso, Texas, and Helen Milburn Eversberg, United States Attorney, Federal Courthouse, San Antonio, Texas 78206.

Dated: May 29th, 1986.

Ronald P. McCluskey

Ronald P. McCluskey

Appendix A
Opinions

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1406

Summary Calendar

OPINION

Alicia M. Grijalva and Amanda Erica Grijalva,
Plaintiffs-Appellants,

v.

United States of America,
Defendant-Appellee.

Filed January 29, 1969

Before: Alvin B. Rubin, Sam D. Johnson, and Edith H. Jones, Circuit Judges.

Opinion by Judge Alvin B. Rubin

Appeal from the United States District Court
for the Western District of Texas
Harry Lee Hudspeth, District Judge, Presiding

SUMMARY

GOVERNMENTAL TORTS

Appeal from holding that Grijalva's tort claim is barred. Affirmed.

Grijalva, a civilian Army employee, was injured when, while driving home from work, she collided with a U.S. Army vehicle. Grijalva applied for and received Workers' Compensation benefits following a determination by the Secretary of Labor that she had been injured in the course of her employment. Grijalva and her daughter now seek damage under the Tort Claims Act.

[1] The Secretary's award of compensation benefits bars Grijalva from bringing any suit against the United States for that injury. [2] Because the Secretary's determination is, by statute, final and conclusive for all purposes and not subject to review, Grijalva cannot now collaterally attack the Secretary's determination of coverage in this Tort Claims Act suit. To attack her eligibility for workers' compensation, Grijalva must request review by the Secretary. [3] Because Grijalva's daughter's claims

for loss and support clearly derive directly from Grijalva's injuries, the door is barred as firmly against the daughter as it is against the mother. [4] The demand for double costs is denied because this appeal is not so patently lacking in merit as to be frivolous.

OPINION

ALVIN B. RUBIN, Circuit Judge:

A Government employee who sought and obtained benefits under the Federal Employee's Compensation Act now contends that she was not covered by the Compensation Act and seeks to recover in tort from the United States under the Federal Tort Claims Act. We affirm the district court judgment holding that her tort claim is barred by the Secretary of Labor's decision that she was entitled to benefits under the Compensation Act. Unless the Secretary's decision is set aside by direct attack, this determination precludes Grijalva's suit under the Tort Claims Act.

Alicia M. Grijalva, a civilian employee of the U.S. Army, suffered injuries when the vehicle she was driving home from work collided with a U.S. Army vehicle, which had failed to stop at a stop sign, on the U.S. Army Military Reservation at White Sands Missile Range, New Mexico. On the day after the accident, Grijalva's supervisor filed a notice of injury with the Department of Labor. Subsequently, Grijalva herself filed a claim for compensation. The Secretary of Labor determined that Grijalva had been injured in the course of her employment, and the Office of Workers' Compensation has paid her thus far $32,254.20 in disability compensation, $11,706.90 in reimbursement of her medical expenses, and $2,244 in continuation of salary during her disability.

Having exhausted the administrative procedures of the Federal Tort Claims Act, Grijalva and her daughter filed suit in federal district court seeking damages under the Tort Claims Act.[1] The district court rendered summary judgement against Grijalva,

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[1] 28 U.S.C. §1346(b).

holding that, by granting workers' compensation benefits under the Compensation Act,[2] the Secretary of Labor had determined that the Compensation Act covered Grijalva's injuries; the Compensation Act barred review of the Secretary's determinations; and recovery under the Compensation Act barred subsequent claims against the Government under the Tort Claims Act.

[1] The Compensation Act provides, "The liability of the United States...under this subchapter...is exclusive and instead of all other liability of the United States...."[3] The Secretary's award of compensation benefits bars Grijalva from bringing any suit against the United States for that injury.[4]

In effect, Grijalva contests her right to recover under the Compensation Act. She argues that, because she was on her way home when the accident occurred, she was not "injured in the performance" of her federal employment and is therefore not covered by the Compensation Act. Grijalva buttresses this legal position by contending that her supervisor submitted erroneous information to the Secretary, that she did not initially apply for benefits (although she later did), and that the accident affected her mental capacity and made her incapable of submitting an informed and voluntary application for benefits.

[2] The fact remains that the Secretary awarded Grijalva benefits under the Compensation Act, and Grijalva accepted them. Under the Act, the Secretary's determination is "final and conclusive for all purposes and with respect to all questions of law and fact...and not subject to review...by a court by manda-

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[2]5U.S.C. §§8101-8151.

[3]U.S.C. §8116(c). That section reads in full:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.

[4]*Gill v. United States* 641 F.2d 195, 197 (5th Cir. 1981); *see also Wright v. United States*, 717 F.2d 254, 256-58 & n.4.

mus or otherwise."[5] Accordingly, Grijalva cannot now collaterally attack the Secretary's determination of coverage in this Tort Claims Act suit.[6] Regardless of her mental capacity at the time she sought compensation benefits, she did so. The Act provides that, if she now wishes to attack her eligibility for or receipt of workers' compensation or her mental capacity to seek and accept those benefits, she must request review by the Secretary.[7] The attack on the Secretary's award as violating her due process rights because of her off-duty status at the time of injury and her alleged lack of mental capacity must follow the same path. If the Secretary decides that benefits should not have been paid, he may terminate any continuing compensation and seek recovery of payments previously made.[8]

[3]Grijalva's daughter seeks damages against the Government for loss of Grijalva's support and services on the basis that the Federal Tort Claims Act makes the United States liable in tort in the same manner as a private individual.[9] The Compensation Act provides that the Government's liability under the Act "with respect to the injury...of an employee is exclusive and instead of all other liability to...the employee, his...dependents, ...and any other person otherwise entitled to recover damages from the United States.[10] As explained by the Sixth Circuit in *Woerth v. United States*, "The proper inquiry under section 8116(c) is not merely whether the plaintiff is an "employee, his legal representative, spouse, dependents, next of kin, [or] any other person otherwise entitled to recover damages." Rather it is whether the claim is "with respect to the injury or death of an employee."[11] Grijalva's daughter's claims for loss and support clearly derive

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[5] 5 U.S.C. §8128(b).

[6] *Gill v. United States*, 641 F.2d 195, 197 (5th Cir. 1981); *see also Concordia v. U.S. Postal Serv.*, 581 F.2d 439, 443 (5th Cir. 1978); Waters v. United States, 458 F.2d 20, 22 (8th Cir. 1972).

[7] 5 U.S.C. §8128(a).

[8] *Id.* at 5 U.S.C. §8129(a).

[9] 28 U.S.C. §2674.

[10] 5 U.S.C. §8116(c).

[11] 714 F.d 648, 650 (6th Cir. 1983).

directly from her mother's injuries.[12] Hence, section 8116(c) bars the door to Grijalva's daughter as firmly as it does to Grijalva.

[4] The Government contends that this is a frivolous appeal and seeks double costs under Federal Rule Appellate Procedure 38. The arguments raised by assiduous counsel for appellant are thin, albeit ingenious. Perhaps because we are beguiled by the apparent sincerity with which they are pressed, we hold that the appeal is not so patently lacking in merit as to be frivolous and deny the demand.

For these reasons, the decision is AFFIRMED.

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[12]*See id.; Levine v. United States*, 478 F. Supp. 1389, 1391 (D. Mass 1979).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

EP-84-CA-286

Alicia M. Grijalva and Amanda Erica Grijalva,
Plaintiffs,

v.

United States of America,
Defendant

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is an action for damages under the Federal Tort Claims Act, 28 U.S.C. §1346(b). Plaintiff Alicia M. Grijalva, a civilian employee of the United States Government, was injured in an automobile accident on the military reservation at White Sands Missile Range, New Mexico on August 11, 1982. The opposing vehicle was driven by a soldier on active duty with the United States Army. The Defendant has moved for summary judgment in its favor, and the Plaintiffs have moved for summary judgment in their favor on the issue of liability. The Court finds that there is no genuine issue of material fact, and that the Defendant is entitled to judgment in its favor as a matter of law.

The facts established by the pleadings, affidavits, and other documents on file are as follows: On August 11, 1982, Plaintiff was leaving White Sands Missile Range where she was employed as an optical equipment operator. Before she left the military reservation, however, an Army vehicle ran a stop sign at an intersection and collided with the automobile occupied by the Plaintiff. As a result of the collision, Mrs. Grijalva sustained substantial injuries. The following day, August 12, 1982, Mrs. Grijalva's supervisor filed a Form CA-1 (Federal Employee's Notice of Traumatic Injury and Claim for Gontinuation of Pay/Compensation) on behalf of Mrs. Grijalva. On September 22, 1982, Mrs. Grijalva herself filed a Form CA-7 (Claim for Compensation on Account of Traumatic Injury). Since the date of the injury, the Plaintiff has been receiving benefits from the United States Government under the Federal Employees' Com-

pensation Act. The amount of disability compensation paid to date exceeds $30,000.00, and her medical expenses exceed $11,000.00.

An employee of the United States Government who suffers disability or death resulting from a personal injury sustained while in the performance of her duty is entitled to compensation under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§8101 et seq. Section 8116(c) provides that the FECA is the exclusive remedy against the United States for an injury within its coverage. In other words, a Government employee injured in the performance of his or her federal employment may not bring an action under the Federal Tort Claims Act. *Avasthi v. United States*, 608 F.2d 1059 (5th Cir. 1979); *Concordia v. United States Postal Service*, 581 F.2d 439 (5th Cir. 1978); *Bailey v. United States*, 451 F.2d 963 (5th Cir. 1971). In the instant case, the Secretary of Labor, by granting FECA benefits to Mrs. Grijalva, has determined that she is within the coverage of the FECA. Such a determination by the Secretary of Labor is not reviewable by this or any other court. 5 U.S.C. §8126(b). This is the basis upon which the Defendant moves for summary judgement in its favor.

The Plaintiff's response to the Defendant's motion is twofold: (1) that the Plaintiff's supervisor, and not the Plaintiff personally, initiated the application for benefits under the FECA, and (2) that Plaintiff was not legally eligible for FECA benefits, because she was not "in the performance of...duty" at the time of the accident which gave rise to her injuries. These arguments cannot avail the Plaintiff. Even if the Secretary of Labor erred in finding Mrs. Grijalva entitled to FECA benefits, this finding binds the courts. *Gill v. United States*, 641 F.2d 195, 197 (5th Cir. 1981). The Plaintiff's argument amounts to nothing more than a "back stairs attempt" to obtain judicial review of the Secretary's decision, when it is clearly unreviewable because of Section 8128(b). *Gill v. United States, supra.* Therefore, under the terms of Section 8116(c), Mrs. Grijalva is barred from bringing any action against the United States under the Federal Tort Claims Act. *Gill v. United States, supra; Waters v. United States*, 458 F.2d 20, 22 (8th Cir. 1972). The Plaintiff's motion for partial summary judgment in her favor must be denied, and the Defendant's motion for summary judgment must be granted.

It is therefore, ORDERED that the Plaintiff's motion for partial summary judgment in the above-styled and numbered cause be, and it is hereby, DENIED.

It is further ORDERED that the Defendant's motion for summary judgment be, and it is hereby, GRANTED.

SIGNED AND ENTERED this 3rd day of June, 1985.

Harry Lee Hudspeth
United States District Judge

Appendix B
Statutes Involved

STATUTES

Fifth Amendment of the United States Constitution.

Title 5 U.S.C. §8101 et seq.

Title 5 U.S.C. §8102(a).

Title 5 U.S.C. §8102.

Title 5 U.S.C. §8128.

Title 5 U.S.C. §8128(b).

Title 28 U.S.C. §1346(b).

Title 28 U.S.C.S. §1254(1).

Title 28 U.S.C.S. §2671 et seq.

Revised Civil Statutes of Texas, ART. 5547-80(a).

Appendix C
Judgement of District Court

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1406
Summary Calendar
D.C. Docket No. EP-84-CA-286

Alicia M. Grijalva and Amanda Erica Grijalva,
Plaintiffs-Appellants,
v.
United States of America,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

Before RUBIN, JOHNSON, and JONES, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHERED ORDERED that plaintiffs-appellants pay to the defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

January 29, 1986
ISSUED AS MANDATE: Feb. 20, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

EP-84-CA-286

Alicia M. Grijalva and Amanda Erica Grijalva,
Plaintiffs,
v.
United States of America,
Defendant.

JUDGMENT

In accordance with the Order Granting Defendant's Motion for Summary Judgment this ay entered in the above-styled and numbered cause,

It is ORDERED, ADJUDGED, and DECREED that judgment be, and it is hereby, entered in favor of the Defendant, and that the Plaintiffs take nothing by their suit.

It is further ORDERED that the Plaintiffs pay the costs of suit herein incurred.

SIGNED AND ENTERED this 3rd day of June, 1985.

Harry Lee Hudspeth
United States District Judge